

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Commerce and Consumer Services Committee

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BILL: SB 492

INTRODUCER: Senators Diaz de la Portilla and King

SUBJECT: Violent Video Games

DATE: January 10, 2006

REVISED: 1/11/06

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ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Earlywine	Cooper	CM	<b>Favorable</b>
2.		CJ	
3.		JU	
4.		JA	
5.			
6.			

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## I. Summary:

This bill prohibits a person from selling or renting a violent video game to a minor and prohibits a minor from playing a violent video game in a video arcade. This bill requires that any violent video game imported or distributed in Florida must display a specific label.

This bill authorizes an “enforcing authority” to seek injunctive relief and civil penalties. Additionally, this bill declares a violation of the act a second degree misdemeanor, and a subsequent violation a first degree misdemeanor.

This bill creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

Currently, Florida law prohibits the sale of harmful materials to minors. A minor is defined as a person under the age of eighteen,<sup>1</sup> and “harmful to minors” as:

[A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

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<sup>1</sup> Section 847.001(8), F.S.

(c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors. . .<sup>2</sup>

Further, Florida law makes it a third degree felony for a person to knowingly sell, rent, or loan for monetary consideration material to a minor if the material is:

[A] picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.<sup>3</sup>

Florida law also prohibits knowingly selling or renting a videocassette or videotape of a motion picture, or similar presentation to a minor.<sup>4</sup> A violation of such is a first degree misdemeanor.<sup>5</sup>

Under current law, it appears that the sale or rental of a video game to a person under 18 years old could be charged as a violation, if the video game includes visual representation or images of nudity or certain types of sexual conduct and is harmful to minors. However, there is no current prohibition against the sale or rental of video games containing representations or images of non-sexual violence.

Although it is not required by law, many commercially-distributed video games display content and suitability ratings on the cover. The Entertainment Software Ratings Board (ESRB) of the Entertainment Software Association (ESA), rates video games by content and age-appropriateness. In addition to the age-appropriateness rating, the ESRB system includes content descriptors such as “blood and gore,” “intense violence,” and “strong sexual content.”

The American Amusement Machine Association has drafted ratings for coin-operated arcade machines that provide information to consumers analogous to the information provided by the ratings established by the Entertainment Software Rating Board for home video games. It is not age based and uses color-coded Parental Advisory Disclosure Messages to alert players to game content.

### III. Effect of Proposed Changes:

**Section 1** creates an unnumbered section of the Florida Statutes to provide that violent video games may not be sold or rented to minors. Additionally, the section provides that a minor may not be permitted to play a violent video game at a video arcade if the video game has been labeled as violent. This section also provides definitions for terms specific to the act.

This section provides an affirmative defense to a person who is shown evidence that the player of the video game was not a minor or that the manufacturer failed to label a violent video game as required by this section. A violent video game may be sold or rented to a minor’s parent, grandparent, aunt, uncle or legal guardian.

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<sup>2</sup> Section 847.001(6), F.S.

<sup>3</sup> Section 847.012(2)(a), F.S.

<sup>4</sup> Section 847.013(2)(b), F.S.

<sup>5</sup> Section 847.013(2)(f), F.S.

This section also provides that every violent video game imported or distributed in Florida for retail sale, rental or playing in an arcade must be labeled with a solid white “18” of not less than 2 inches by 2 inches outlined in black on the front of the video game package. However, the bill does not address how this provision will be enforced.

This section authorizes an “enforcing authority” to institute a civil action to seek injunctive relief or civil penalty of not more than \$1,000 per violation or not more than \$250 if the person against whom the penalty is being assessed is an employee of a business selling, renting, ore playing the violent video game. Any civil penalties collected will be deposited into the General Revenue Fund. If a civil penalty is assessed, this section also authorizes the enforcing authority reasonable attorney’s fees and costs. This section provides that a violation of the act is a second degree misdemeanor, and a second or subsequent violation is a first degree misdemeanor. In addition, this provision would allow anyone harmed by a violation of the act to seek damages.

**Section 2** provides an effective date of October 1, 2006.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

##### **First Amendment**

The First Amendment of the United States Constitution restricts the ability of government to regulate speech, which may include obscene and violent speech or representations. The United States Supreme Court has determined that children have First Amendment rights,<sup>6</sup> but that potential harm to children is a permissible ground for trying to shield them from sexual expression that does not rise to the level of obscenity.<sup>7</sup> However, violence that is not in a sexual context and depictions of non-sexual criminal activity have not generally been considered obscene or content that may be regulated by the state in the same manner as material with sexual content that is not obscene to adults but is harmful to children.<sup>8</sup>

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<sup>6</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

<sup>7</sup> *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

<sup>8</sup> *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir.2001), *cert. denied*, 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001); *Interactive Digital Software Association v. St.Louis County, Missouri*, 329 F.3d 954 (8th Cir. 2003).

Federal appellate courts have found that video games are protected forms of expression on a par with books, movies, or other literary forms.<sup>9</sup> Restrictions on the content of such expression are examined by the court under a “strict scrutiny” standard, which requires the government must show that such a restriction is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest.<sup>10</sup>

There is an exception to application of the strict scrutiny standard for material with sexual content that is not obscene for adults but is obscene for children.<sup>11</sup> In such cases, a much less restrictive “rational basis” standard of review is applied.<sup>12</sup>

This bill contains findings that minors who are exposed to violence in video games may experience feelings of aggression, a reduction of activity in the frontal lobes of the brain, exhibit violent antisocial or aggressive behavior, or suffer from psychological harm. This bill also finds that the state has a compelling interest in preventing violent, aggressive, and antisocial behavior and in preventing psychological harm to minors. However, even given those findings, it is not clear whether the courts will uphold the provision prohibiting selling or renting a violent video game to a minor, if challenged as violating the First Amendment.

### Commerce Clause

This bill requires all violent video games that are imported or distributed into the State to contain a specific label, which may potentially violate the dormant Commerce Clause. Congress has the power to regulate commerce among the states.<sup>13</sup> Though phrased as a grant of regulatory power to Congress, the Commerce Clause has long been understood to have a negative or dormant aspect that denies the states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce.

The Dormant Commerce Clause doctrine distinguishes between state regulations that “affirmatively discriminate” against interstate commerce and evenhanded regulations that “burden interstate transactions only incidentally.”<sup>14</sup> Regulations that “clearly discriminate against interstate commerce [are] virtually invalid per se,”<sup>15</sup> while those that incidentally burden interstate commerce will be struck down only if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>16</sup>

State regulations may burden interstate commerce “when a statute (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their

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<sup>9</sup> *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir.2001), *cert. denied*, 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001); *Interactive Digital Software Association v. St.Louis County, Missouri*, 329 F.3d 954 at 958 (8th Cir. 2003).

<sup>10</sup> *Interactive Digital Software Association v. St.Louis County, Missouri*, 329 F.3d 954 at 958 (8th Cir. 2003).

<sup>11</sup> *Id.* at 959.

<sup>12</sup> *Id.*.

<sup>13</sup> Art. I, s. 8, *U.S. Constitution*.

<sup>14</sup> *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

<sup>15</sup> *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 108 (2d Cir.2001).

<sup>16</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods."<sup>17</sup>

In *Johnson*, the court discussed three ways a statute can violate the Commerce Clause. First, a statute may violate the Commerce Clause if it directly regulates conduct outside the state's borders.<sup>18</sup> Second, a statute may violate the Commerce Clause if the burdens on interstate commerce exceed the local benefit of the statute.<sup>19</sup> Finally, statutes that subject individuals to inconsistent regulations where the subject of the regulation has been recognized as requiring national regulation have been held to run afoul of the Commerce Clause.<sup>20</sup>

However, the mere fact that the regulation impacts out-of-state providers does not in itself make the extraterritorial regulation illegal. A state statute must be upheld if it "regulates evenhandedly" a legitimate public interest and the effects of the statute on interstate commerce are only incidental.<sup>21</sup> In *Hamling v. United States*, the court stated that just because community standards vary does not necessarily render a statute unconstitutional.<sup>22</sup>

Accordingly, it is not clear whether the courts will uphold the provision prohibiting distribution of violent video games without a label, if challenged as violating the Dormant Commerce Clause.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The bill may have a negative impact upon rental and sales of video games. However, the financial impact may not be significant since the games could be purchased by persons who are 18 years old or older for use by younger persons.

<sup>17</sup> *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2d Cir.2003) (citations omitted).

<sup>18</sup> *ACLU v. Johnson*, 194 F.3d 1149, 1160-1161 (10th Cir. 1999).

<sup>19</sup> *Id.* at 1161-1162. See also, *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)(the Commerce Clause "bars state regulations that unduly burden interstate commerce.").

<sup>20</sup> *Johnson* at 1162.

<sup>21</sup> *Edga v. Mite Corporation*, 457 U.S. 624, 640 (1981).

<sup>22</sup> *Hamling v. United States*, 418 U.S. 87, 106 (1974)(holding that the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity). *American Trucking Associations, Inc. v. Michigan Public Commission*, 73 U.S. 4532 (2005) (The Court held that a \$100 annual fee on trucks that engage in intrastate commercial hauling does not violate the dormant Commerce Clause because it is assessed evenhandedly and is focused on local activity.)

C. Government Sector Impact:

The bill creates a new criminal offense which could result in misdemeanor convictions, with potential costs for prosecution and punishment.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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